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PAGE 01 USBERL 00207 01 OF 06 261425Z
ACTION EUR-12

INFO OCT-01 ISO-00 L-03 PER-01 OPR-02 TRSE-00 ABF-01
FS-01 MMO-01 A-01 /023 W
-----027829 261704Z /41
P R 261055Z JAN 78
FM USMISSION USBERLIN
TO SECSTATE WASHDC PRIORITY 6114
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LIMITED OFFICIAL USE SECTION 1 OF 6 USBERLIN 0207

DEPARTMENT FOR L/M BURMAN & EUR/CE CHESTER
BONN FOR CROWLEY, BELLINGER & PFUND
SECDEF FOR DOD/GC JAMES ALLEN

E O 11652: NA
TAGS: AFSP, AINF, GW, WB, AKB
SUBJ: STATUS OF US CITIZENS AND RESIDENT ALIENS EMPLOYED IN
LOCAL NATIONAL POSITIONS ADMINISTERED BY US FORCES IN
BERLIN: ARE THEY US GOVERNMENT EMPLOYEES?

REFS: (A) STATE 13404 (NOTAL); (B) BONN 850 (NOTAL)

SUMMARY: FOLLOWING IS ADDITIONAL INFORMATION ON SUB-
JECT MATTER REQUESTED BY DEPARTMENT IN REFTEL A. CON-
CLUSION OF POST IS THAT USG IS NOT RPT NOT EMPLOYER
OF PERSONNEL IN QUESTION, AND THAT EMPLOYER IS ALLIED
KOMMANDATURA, BERLIN, OR PERHAPS SUCCESSOR GOVERNMENT
OF THIRD REICH. IN POST OPINION, SERIOUS
ADVERSE CONSEQUENCES COULD RESULT FROM DECISION USG
IS EMPLOYER IN AREAS OF: (A) US-FRG RELATIONS; (B)
LABOR RELATIONS AND STAFFING OF LOCAL NATIONAL (LN)
POSITIONS IN BERLIN, AND (C) COST TO THE US TAXPAYER.
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PAGE 02 USBERL 00207 01 OF 06 261425Z

NONETHESS, IF DECISION IS FINALLY REACHED THAT
USG IS THE EMPLOYER, POST STRONGLY RECOMMENDS THAT
CONSULTATIONS BE UNDERTAKEN ON ONE HAND WITH FRG AND
ON OTHER IN ALLIED KOMMANDATURA BEFORE ANY ACTS OF
IMPLEMENTATION ARE UNDERTAKEN (SUCH ACTS WOULD INCLUDE
IRS AGENTS ADVISING US CITIZENS OR RESIDENT ALIENS IN
LN POSITIONS IN BERLIN THAT THEY MUST FILE TAX RETURNS

AS IF THEY WERE USG EMPLOYEES). USCOB CONCURS
WITH CONTENTS OF THIS MESSAGE. END SUMMARY

I. THE PROBLEM

IT IS THE OPINION OF THE IRS ATTACHE IN BONN THAT
US CITIZENS AND RESIDENT ALIENS EMPLOYED IN
FRG PROVIDED D-MARK FUNDED LOCAL NATIONAL (LN) POSI-
TIONS ADMINISTERED BY THE U.S. ARMY BERLIN, 7350TH
AIR BASE GROUP, USAF, BERLIN AND U.S. MISSION BERLIN
ARE EMPLOYEES OF THE U.S. GOVERNMENT (USG); AND
ACCORDINGLY, THAT THOSE THREE USG AGENCIES ARE EMPLOYERS
AS DEFINED IN SECTIONS 3401(D) AND 3121(H) OF THE
INTERNAL REVENUE CODE, AND THAT IS IS THE DUTY OF
THESE EMPLOYERS TO COLLECT AND/OR PAY OVER THE
FOLLOWING TAXES TO THE INTERNAL REVENUE SERVICE:

A. WITHHOLDING OF INCOME TAX FROM EMPLOYEES UNDER
SECTION 4302(A) OF THE INTERNAL REVENUE CODE;

B. WITHHOLDING OF OLD-AGE, SURVIVORS AND DIS-
ABILITY INSURANCE AND HOSPITAL INSURANCE UNDER
SECTION 3102 OF THE INTERNAL REVENUE CODE; AND,

C. PAYMENT OF THE EMPLOYER'S SHARE OF OLD-AGE,
SURVIVORS, DISABILITY INSURANCE AND HOSPITAL INSURANCE
UNDER SECTION 3111 OF THE INTERNAL REVENUE CODE.

II. BACKGROUND

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PAGE 03 USBERL 00207 01 OF 06 261425Z

THE PRESENCE OF SUCH PERSONNEL, AND, INDEED, OF
ALL OF THE MEMBERS AND DEPENDENT-MEMBERS OF THE OFFI-
CIAL UNITED STATES (AS WELL AS FRENCH AND BRITISH)
PRESENCE IN BERLIN IS A DIRECT CONSEQUENCE OF THE
OCCUPATION STATUS OF BERLIN; A STATUS WHICH STILL
EXISTS EVEN MORE THAN THIRTY YEARS AFTER THE END
OF THE SECOND WORLD WAR BECAUSE THE FOUR POWERS (US,
UK, FRANCE AND SOVIETS) CONTINUE TO POSSESS RIGHTS
AND RESPONSIBILITIES IN AND ABOUT GREATER BERLIN
(WEST AND EAST BERLIN). THE THREE WESTERN POWERS
(US, UK AND FRANCE) CONTINUE TO BE SUPREME IN THE
WESTERN SECTORS OF BERLIN, WHICH THEY, AS THE ALLIED
KOMMANDATURA (AK), HAVE ADMINISTERED JOINTLY SINCE
THE WITHDRAWAL OF THE SOVIETS FROM ACTIVE PARTICIPA-
TION IN THE AK IN 1948. THE EMPLOYMENT OF US CITIZEN
AND RESIDENT ALIEN PERSONNEL, AS WELL AS OF GERMAN
AND THIRD COUNTRY NATIONALS IN POSITIONS ADMINISTERED
BY THE US FORCES IN BERLIN IS NOT (EXCEPT INDIRECTLY)
FOR THE BENEFIT OF THE USG BUT FOR THE MAINTENANCE
OF THE SECURITY OF BERLIN AND OF THE ALLIED FORCES
STATIONED THERE; IN OTHER WORDS, THE PURPOSE OF THEIR
EMPLOYMENT IS TO FACILITATE THE FULFILLMENT BY THE

AK OF THE OBLIGATIONS ITS THREE MEMBERS CONTINUE TO POSSESS AND JOINTLY EXECUTE. CONSISTENT WITH THIS FACT AND THE INTERNATIONAL LAW OF OCCUPATION, THE FRG MINISTRY OF FINANCE AND NOT THE UK, US OR FRANCE PROVIDES THE FUNDS FOR SUCH LN POSITIONS THROUGH THE OCCUPATION COST BUDGET.

III. ISSUE

WHO IS THE EMPLOYER OF U.S. CITIZENS AND RESIDENT ALIENS EMPLOYED IN D-MARK FUNDED LN POSITIONS ADMINISTERED BY THE US ARMY BERLIN OR THE 7350TH AIR BASE GROUP, USAF, BERLIN?

ANSWER: THE ALLIED KOMMANDATURA, BERLIN (OR THE SUCCESSOR GOVERNMENT OF THE THIRD REICH).
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PAGE 04 USBERL 00207 01 OF 06 261425Z

IN ACTUALITY, THE QUESTION IS IMPROPERLY PHRASED. THE REAL ISSUE IS: WHO IS THE EMPLOYER OF ALL OR ANY PERSONNEL IN POSITIONS ADMINISTERED BY THE ALLIES IN BERLIN, WHOSE SALARY IS PAID FROM OCCUPATION COSTS FUNDS? THE ANSWER TO THAT QUESTION IS THE ALLIED KOMMANDATURA, BERLIN (OR AS DISCUSSED IN THE CONCLU-

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PAGE 01 USBERL 00207 02 OF 06 261427Z
ACTION EUR-12

INFO OCT-01 ISO-00 L-03 PER-01 OPR-02 TRSE-00 ABF-01
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FM USMISSION USBERLIN
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LIMITED OFFICIAL USE SECTION 2 OF 6 USBERLIN 0207

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SION OF THIS SECTION, THE SUCCESSOR GOVERNMENT OF
THE THIRD REICH). PART OF THE DIFFICULTY IN RECOG-
NIZING THE AK AS THE EMPLOYER OF THE US CITIZENS
AND RESIDENT ALIENS IN QUESTION HAS OCCURRED BECAUSE
THE IRS INQUIRY HAS FOCUSED MERELY ON US CITIZENS
OR RESIDENT ALIENS IN LN POSITIONS ADMINISTERED BY THE
US FORCES IN BERLIN AND HAS NOT SOUGHT TO DISCERN THE
STATUS OF ANY AND ALL PERSONS EMPLOYED IN POSITIONS
ADMINISTERED BY THE ALLIED FORCES IN BERLIN, IRRESPECT-
IVE OF NATIONALITY.

HISTORY

ON 14 MAY 1949, THE AK, THE SUPREME ORGAN FOR
BERLIN, ISSUED THE "STATEMENT OF PRINCIPLES GOVERNING
THE RELATIONSHIP BETWEEN THE ALLIED KOMMANDATURA AND
GREATER BERLIN." BY PARAGRAPH 2(E) OF THAT STATEMENT,
THE AK RESERVED ITS POWER IN THE FOLLOWING FIELDS:
2(E) "PROTECTION, PRESTIGE AND SECURITY OF ALLIED
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PAGE 02 USBERL 00207 02 OF 06 261427Z

FORCES, DEPENDENTS (UNDERLINE), EMPLOYEES (UNDERLINE)
AND REPRESENTATIVES, THEIR IMMUNITIES AND SATISFACTION
OF OCCUPATION COSTS AND THEIR OTHER REQUIREMENTS."
(UNDERLINING ADDED)

AFTER THE END OF THE WAR, AS THE WESTERN ALLIES
BEGAN TO EMPLOY LOCAL NATIONALS IN BERLIN, THE AK
INSTRUCTED THE GERMAN AUTHORITIES IN BERLIN (TODAY
KNOWN AS THE "SENAT", BUT AT THAT TIME KNOWN AS
THE "MAGISTRAT") THAT THE EMPLOYMENT OF LOCAL NATIONALS
BY THE ALLIED FORCES WOULD BE GOVERNED BY THE PRO-
VISIONS OF THE TARIF ORDNUNG FUER ANGESTELLTE
WHICH ORIGINALLY HAD BEEN LEGISLATION IN EFFECT IN
GERMANY LONG BEFORE AND DURING WORLD WAR II. IT
WAS A BODY OF RULES, REGULATING THE EMPLOYMENT OF
SALARIED PERSONNEL IN THE CIVIL SERVICE.

IN 1952, THE AK AUTHORIZED THE SENAT (BY BK/L(52)91
AND BK/L(52)94 TO ENTER INTO DISCUSSIONS WITH INTERESTED
UNIONS, NOTABLY THE UNION FOR PUBLIC SERVICES, TRANSPORT
AND TRAFFIC (OETV) WITH THE AIM OF CONCLUDING A TARIFF
AGREEMENT WHICH WOULD APPLY TO LOCAL EMPLOYEES OF THE
THREE WESTERN ALLIES IN BERLIN. THE FIRST OF SUCH
TARIFF AGREEMENTS, BERLIN TARIFF AGREEMENT (BTA) I, WAS
CONCLUDED IN BERLIN ON 2 JULY 1956. THAT AGREEMENT
WAS SUPERSEDED BY BTA II OF 30 JANUARY 1968, WHICH
REMAINS IN EFFECT WITH AMENDMENTS. PRIOR TO THE CON-
CLUSION OF BTA II, THE AK BY BK/O(65)10 EXPRESSLY IN-
STRUCTED THE SENAT, IN AGREEMENT WITH ALLIED AUTHORITIES,

TO:

- A. CONCLUDE TARIFF AGREEMENTS; AND
- B. REGULATE PAYMENT PROCEDURES.

THE BERLIN SENATOR FOR FINANCE NEGOTIATES AND CON-
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PAGE 03 USBERL 00207 02 OF 06 261427Z

CLUDES TARIFF AGREEMENTS AS THE REPRESENTATIVE OF THE
EMPLOYER SIDE. HE ACTS ON THE INSTRUCTIONS AND GUID-
ANCE PROVIDED BY THE ALLIES IN BERLIN THROUGH THE
MEDIUM OF THE ALLIED LABOR WORKING PARTY, A SUB-COMMITTEE
OF THE CIVIL AFFAIRS COMMITTEE OF THE AK.

IN BK/O(65)10 THE AK ALSO EXPRESSLY ORDERED THAT
THE PERSONS EMPLOYED BY THE ALLIES WOULD BE REGULATED
BY GERMAN LABOR AND SOCIAL LAW. (A BK/O IS LAW IN
BERLIN AND CAN BE AMENDED ONLY BY AGREEMENT OF THE THREE
POWERS.)

THE PROVISIONS OF BTA II APPLY TO EMPLOYEES IN
AGENCIES, ENTERPRISES AND OTHER INSTITUTIONS OF THE
ALLIED AUTHORITIES AND FORCES IN THE TERRITORY OF BERLIN
WHO ARE PAID BY THE OFFICIAL GERMAN PAY OFFICE (LOHN-
STELLEN) IN DEUTSCHE MARK, OR FOR WHOM OFFICIAL GERMAN
PAY OFFICES CARRY OUT THE COMPUTATION OF WAGES. BTA II
IS APPLIED TO PERSONS OF ALL NATIONALITIES EQUALLY,
UNLESS THE EMPLOYEE IS AN ALLIED NATIONAL WHO IS ALSO
A DEPENDENT MEMBER OF ONE OF THE ALLIED AUTHORITIES
IN BERLIN. THIS IS BECAUSE THE AK OR ALLIED LABOR
WORKING PARTY, ACTING ON BEHALF OF THE AK, COGNIZANT
THAT DIFFERENT LEGAL AND PRACTICAL SITUATIONS EXIST FOR
EACH OF THE ALLIED FORCES, HAS EXEMPTED SUCH DEPENDENTS
FROM AUTOMATIC COVERAGE BY THE BTA, THOUGH EACH OF THE
ALLIED FORCES HAS APPLIED THE BTA TO ITS DEPENDENTS IN
A MANNER IN CONFORMITY WITH THE ADMINISTRATIVE OR LEGAL
NEEDS OF THE RESPECTIVE FORCES. AS A RESULT, WHILE
THE BTA IS THE BASIC DOCUMENT REGULATING ALL LN
POSITION PERSONNEL REGARDLESS OF NATIONALITY, SPECIFIC
PROVISIONS OF THE BTA MAY APPLY IN DIFFERING DEGREES
TO BRITISH, FRENCH OR US NATIONALS WHO ARE DEPENDENT
MEMBERS OF THEIR RESPECTIVE FORCES.

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PAGE 01 USBERL 00207 03 OF 06 261429Z
ACTION EUR-12

INFO OCT-01 ISO-00 L-03 PER-01 OPR-02 TRSE-00 ABF-01
FS-01 MMO-01 A-01 /023 W
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TO SECSTATE WASHDC PRIORITY 6116
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LIMITED OFFICIAL USE SECTION 3 OF 6 USBERLIN 0207

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ANY OF THE PROVISIONS OF THE BTA MAY BE TERMINATED BY EITHER THE EMPLOYER'S SIDE OR THE EMPLOYEES' REPRESENTATIVES BY GIVING FORMAL WRITTEN NOTICE IN KEEPING WITH ARTICLE 67 OF THE BTA. NEW PROVISIONS MUST THEN BE NEGOTIATED. UNTIL SUCH HAVE BEEN SIGNED, THE OLD ONES REMAIN IN EFFECT. IF THE ALLIES WISH TO TERMINATE ANY PROVISION OF THE BTA, THE FOLLOWING PROVISION MUST BE FOLLOWED:

A. THE ALLIED ELEMENT WISHING TO MAKE THE CHANGE MUST SUBMIT HIS REQUEST TO THAT EFFECT TO HIS TWO OTHER COLLEAGUES OF THE ALLIED LABOR WORKING PARTY;

B. THE THREE ALLIED REPRESENTATIVES MUST JOINTLY DISCUSS THE PROPOSAL;

C. AFTER HAVING UNANIMOUSLY ARRIVED AT A DECISION, THE LABOR WORKING PARTY MUST INSTRUCT THE SENATOR FOR FINANCE TO ADVISE THE EMPLOYEES' REPRESENTATIVES THAT THE PROVISION IS UNDER TERMINATION; AND,
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PAGE 02 USBERL 00207 03 OF 06 261429Z

D. NEW PROVISIONS MUST BE NEGOTIATED AND SIGNED. IF THE EMPLOYEES' REPRESENTATIVES WISH TO TERMINATE A PROVISION OF THE TARIFF AGREEMENT, THE SAME PROCEDURE IS FOLLOWED, EXCEPT THE SEQUENCE IS REVERSED.

CONCLUSION

THE EMPLOYER OF LN PERSONNEL WHO ARE PAID IN DEUTSCHE MARKS FROM OCCUPATION COST FUNDS IS THE AK. WHILE EACH OF THE ALLIED FORCES HAS BEEN GRANTED LEE-

WAY TO PROVIDE FOR SPECIAL CIRCUMSTANCES (INCLUDING DEPENDENTS), THE ULTIMATE AUTHORITY FOR THE EMPLOYMENT OF SUCH PERSONNEL RESIDES IN THE AK WHICH HAS DELEGATED CERTAIN FUNCTIONS TO THE BERLIN SENAT. THE LABOR WORKING PARTY ACTS ON BEHALF OF THE AK IN INSTRUCTING AND SUPERVISING THE SENAT. ACCORDINGLY, AS THE USG, REPRESENTED BY US ARMY, BERLIN OR THE 7350TH AIR BASE GROUP USAF, BERLIN, IS NOT THE EMPLOYER OF GERMAN OR THIRD COUNTRY LOCAL NATIONALS EMPLOYED IN LN POSITIONS AND WHO ARE PAID IN DEUTSCHE MARKS FROM THE OCCUPATION COST FUNDS, THE USG IS ALSO NOT THE MPLOYER OF US CITIZENS OR RESIDENT ALIENS EMPLOYED IN THE SAME LN POSITIONS.

ALTERNATELY, THE EMPLOYER OF SUCH PERSONNEL IS NOT THE AK, THE OCCUPYING POWER, BUT MAY BE THE OCCUPIED POWER.

UNDER THE INTERNATIONAL LAW OF WAR, THE OCCUPYING POWER MAY REQUIRE THE OCCUPIED POWER TO MEET ALL OF THE EXPENSES OF THE OCCUPATION WHICH ARE NECESSARY, PROPER, AND IN SOME CASES EVEN MERELY DESIRABLE, SO LONG AS THEY ARE REASONABLE. THIS CONTEMPLATES THE PROVISION OF SERVICES AND GOODS, AS WELL AS FUNDS. THE RIGHT OF THE OCCUPYING POWER TO CONTROL THE OCCUPIED POWER AND ITS INSTRUMENTALITIES, AND TO DICTATE THE PROCEDURES BY WHICH THE RESPECTIVE GOODS AND SERVICES ARE TO BE PROVIDED, NEED NOT, HOWEVER, CONTEMPLATE LIMITED OFFICIAL USE

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PAGE 03 USBERL 00207 03 OF 06 261429Z

AN EMPLOYER-EMPLOYEE RELATIONSHIP. RATHER, THE AUTHORITY WHICH THE OCCUPYING POWER EXERCISES IS MORE AKIN TO THE EXERCISE OF SOVEREIGN PREROGATIVES, SO LONG AS THE OCCUPATION CONTINUES. OF COURSE, THE EXTENT TO WHICH IT MIGHT CHOOSE TO DIVEST ITSELF OF THESE PREROGATIVES IS AS VARIED AND FLEXIBLE AS THE POLICIES OF THE OCCUPYING POWER SO DICTATE. BUT ABSENT A PARTIAL OR TOTAL DIVESTMENT OF SUCH PREROGATIVES, IT IS CONSISTENT WITH INTERNATIONAL LAW THAT THE OCCUPYING POWER DICTATE THE TERMS BY WHICH LABOR, SERVICES, OR GOODS ARE FURNISHED IT BY THE OCCUPIED POWER. THE RETENTION OF SUCH AUTHORITY IN NO MANNER ALTERS THE RELATIONSHIP BETWEEN THE TWO POWERS, NOR DOES IT REQUIRE THAT ANY PORTION OF THE LABOR FORCE PROVIDED THE OCCUPYING POWER SHOULD BE DEEMED ITS EMPLOYEES. OBVIOUSLY, SHOULD THE OCCUPYING POWER ELECT TO CONFER A MORE PREVILEGED STATUS ON THE LABOR FORCE PROVIDED IT BY THE OCCUPIED POWER, IT MAY DO SO. IN SHORT, AN OCCUPYING POWER IS NOT NECESSARILY THE EMPLOYER OF THE LABOR FORCE FURNISHED IT BY THE OCCUPIED POWER.

IN THE INTRODUCTION TO THIS SECTION, IT IS IMPLIED THAT THE SUCCESSOR GOVERNMENT OF THE THIRD REICH IS THE OCCUPIED POWER OF BERLIN. THE DIVISION OF GERMANY AFTER THE SECOND WORLD WAR HAS OBSCURED THE QUESTION

OF WHICH IS THE SUCCESSOR GOVERNMENT OF THE THIRD REICH. EVEN THOUGH THE GOVERNMENT OF THE FEDERAL REPUBLIC HAS ACCEPTED MANY OBLIGATIONS OF THE THIRD REICH AS ITS SUCCESSOR, (AND EVEN THOUGH IT DEFRAYS ALLIED OCCUPATION COSTS IN BERLIN), IT IS NOT CLEAR THAT THE FEDERAL REPUBLIC WOULD AGREE TO BE SO REGARDED FOR THE PURPOSE OF THE MATTER AT HAND.

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PAGE 01 USBERL 00207 04 OF 06 261444Z
ACTION EUR-12

INFO OCT-01 ISO-00 L-03 PER-01 OPR-02 TRSE-00 ABF-01
FS-01 MMO-01 A-01 /023 W
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P R 261055Z JAN 78
FM USMISSION USBERLIN
TO SECSTATE WASHDC PRIORITY 6117
INFO SECDEF WASHDC
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LIMITED OFFICIAL USE SECTION 4 OF 6 USBERLIN 0207

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IV. ISSUE

WHO IS THE EMPLOYER OF US CITIZENS EMPLOYED IN LN POSITIONS ADMINISTERED BY THE US MISSION BERLIN AND WHO ARE PAID IN DEUTSCHE MARKS FROM OCCUPATION COSTS FUNDS? ANSWER: THE US ELEMENT OF THE ALLIED KOMMANDATURA BERLIN (OR THE SUCCESSOR GOVERNMENT OF THE THIRD REICH).

THESE PERSONNEL ARE NOT EMPLOYED PURSUANT TO BTA II, BUT ARE EMPLOYED PURSUANT TO EMPLOYMENT CONTRACTS SIGNED BY AN OFFICER OF THE US MISSION BERLIN OR US EMBASSY BONN. WHILE THE USG BENEFITS FROM THE SERVICES OF THESE PERSONNEL, THE SERVICES THEY PROVIDE ARE IN DIRECT FULFILLMENT OF US OBLIGATIONS AS AN OCCUPYING POWER IN BERLIN, AND WOULD NOT BE REQUIRED WERE THE UNITED STATES NOT PRESENT IN BERLIN AS ONE OF THE SUPREME OCCUPYING POWERS. IN ACCORDANCE WITH THAT FACT, THESE PERSONNEL HAVE NOT BEEN (NOR WERE THEIR PREDECESSORS EVER) HIRED AS USG EMPLOYEES.

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PAGE 02 USBERL 00207 04 OF 06 261444Z

THESE POSITIONS ARE AS FOLLOWS:

1. JUSTICE OF THE SUPREME RESTITUTION COURT FOR BERLIN (SRC), A TRIBUNAL ESTABLISHED BY ALLIED KOMMANDATURA LAW NO. 25 TO ADJUDICATE CLAIMS OF RESTITUTION ARISING IN CONNECTION WITH THE SECOND WORLD WAR. THE LAW DIRECTED, INTER ALIA, THAT EACH ALLIED POWER WOULD APPOINT A JUSTICE OF THE RESPECTIVE POWER'S NATIONALITY TO SERVE ON THE SRC.

2. DIRECTOR, BERLIN DOCUMENT CENTER (BDC), A REPOSITORY OF CAPTURED NAZI AND OTHER THIRD REICH DOCUMENTS. THROUGH THE YEARS THE BDC HAS HOUSED DOCUMENTS CAPTURED BY THE ALLIES. (TODAY MOST OF THE DOCUMENTS AT THE BDC ARE THOSE CAPTURED BY THE US ARMY). THE DIRECTORSHIP OF THE BDC IS FILLED BY AN AMERICAN, IN PART, BECAUSE THE BDC IS LOCATED IN THE US SECTOR OF BERLIN.

3. CONSULTANT ON PUBLIC SAFETY AFFAIRS TO THE PUBLIC SAFETY ADVISER. EACH ALLIED ELEMENT IN BERLIN HAS SUCH A POSITION FILLED BY A RESPECTIVE NATIONAL. IT IS THE OFFICER'S FUNCTION TO LIAISE WITH HIS ALLIED COUNTERPARTS AND WITH BERLIN POLICE IN ORDER TO ASSIST THE AK IN FULFILLING ITS OBLIGATIONS TO ENSURE THE SECURITY AND PUBLIC ORDER OF BERLIN.

4A. SECRETARY IN THE OFFICE OF THE AMBASSADOR OF THE UNITED STATES TO GERMANY, WHO IS THE SUCCESSOR TO THE US HIGH COMMISSIONER FOR GERMANY, AND WHO IS THE SUPERIOR US OFFICIAL IN GERMANY ON MATTERS RELATED TO THE CONTINUED OCCUPATION OF BERLIN.

B. SECRETARY IN THE POLITICAL SECTION OF THE US EMBASSY BONN.

THE SECRETARIES IN BOTH POSITIONS PERFORM DUTIES IN SUPPORT OF THE US MISSION'S (BERLIN) MULTILATERAL RESPONSIBILITIES WITH ALLIED OCCUPYING AUTHORITIES.

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PAGE 03 USBERL 00207 04 OF 06 261444Z

V. ISSUE

WHAT WOULD BE THE CONSEQUENCE OF A DECISION THAT THE US GOVERNMENT IS THE EMPLOYER OF US CITIZENS AND RESIDENT ALIENS WHO ARE EMPLOYED IN LN POSITIONS ADMINISTERED BY THE US FORCES IN BERLIN AND WHO ARE PAID IN DEUTSCHE MARKS FROM OCCUPATION COST FUNDS?

ANSWER:

1. A DEFINITE INCREASE IN THE COST OF THE OCCUPATION
WOULD ACCRUE TO THE FEDERAL REPUBLIC OF GERMANY, IN THE
FORM OF:

A. LOSS OF TAXES (OF THOSE US CITIZEN OR RESIDENT
ALIEN EMPLOYEES WHO ARE NOT DEPENDENTS OF MILITARY OR
US MISSION PERSONNEL);

B. INCREASED SALARY FOR US DEPENDENTS (WHO
NOW RECEIVE 85 PERCENT OF THE SALARY RECEIVED BY GERMAN OR
THIRD NATIONAL EMPLOYEES) OR REPLACEMENT OF SUCH EM-
PLOYEES BY GERMAN OR THIRD COUNTRY NATIONALS WHO RE-
CEIVE A FULL SALARY; AND

C. LOSS OF RECIRCULATION IN THE GERMAN ECONOMY
OF TAXES (INCOME OR SOCIAL SECURITY) WHICH ARE PAID TO
THE US.

2. PROBABLE INCREASED COSTS WOULD ACCRUE IN THE
FORM OF:

A. ADMINISTRATIVE COSTS OF WITHHOLDING US INCOME
TAXES AND THE NEED TO CONVERT TAXES WITHHELD FROM DEUTSCHE
MARKS TO US DOLLARS;

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PAGE 01 USBERL 00207 05 OF 06 261619Z
ACTION EUR-12

INFO OCT-01 ISO-00 L-03 PER-01 OPR-02 TRSE-00 ABF-01
FS-01 MMO-01 A-01 /023 W
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P R 261055Z JAN 78
FM USMISSION USBERLIN
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LIMITED OFFICIAL USE SECTION 5 OF 6 USBERLIN 0207

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B. ADMINISTRATIVE COSTS OF WITHHOLDING SOCIAL
SECURITY TAXES AND CONVERSION; AND

C. PAYMENT OF THE EMPLOYER'S SHARE OF SOCIAL SECURITY TAXES (PROVIDED THIS IS LEGALLY PERMISSABLE UNDER LAWS OF OCCUPATION).

3. POSSIBLE COSTS TO THE UNITED STATES (DEPENDING ON WHICH COSTS ARE PASSED ONTO THE FRG):

A. ADMINISTRATIVE COSTS FOR WITHHOLDING US TAXES;

B. ADMINISTRATIVE COSTS FOR WITHHOLDING SOCIAL SECURITY TAXES;

C. EMPLOYER CONTRIBUTION FOR SOCIAL SECURITY;

D. POSSIBILITY OF SOCIAL SECURITY BENEFITS ACCRUING TO CURRENTLY EMPLOYED AND FORMERLY EMPLOYED US CITIZENS AND RESIDENT ALIENS IN EXCESS OF PAYMENTS MADE BY THEM;

E. PAYMENT OF SALARIES OF US CITIZENS, RESIDENT ALIENS, GERMAN AND THIRD COUNTRY NATIONALS AS USG EMPLOYEES (UNLESS IT IS DETERMINED THAT THERE IS NO LIMITED OFFICIAL USE

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PAGE 02 USBERL 00207 05 OF 06 261619Z

US DOMESTIC LEGAL OBSTACLE TO PAYMENT OF SALARIES OF USG EMPLOYEES BY A FOREIGN POWER);

F. POSSIBILITY OF LAWSUITS AGAINST THE USG (DEPARTMENT OF DEFENSE OR STATE DEPARTMENT) BASED ON THE RELIANCE (TO THEIR INJURY) OF PAST AND CURRENT US CITIZEN OR RESIDENT ALIEN LN EMPLOYEES ON OFFICIAL REPRESENTATIONS THAT THEY ARE NOT USG EMPLOYEES; AND,

G. COST OF FRINGE BENEFITS TO USG EMPLOYEES, INCLUDING POSSIBLE RE-EMPLOYMENT RIGHTS IN THE US.

4. ARGUABLE VIOLATION BY THE US OF ITS UNDERTAKING IN THE LETTER DATED MAY 26, 1952, AS AMENDED OCTOBER 23, 1954, OF THE THREE ALLIED HIGH COMMISSIONERS TO CHANCELLOR ADENAUER IN WHICH THE THREE POWERS STATED THAT "IT IS THEIR INTENTION TO FIX SUCH /OCCUPATION/ COSTS AT THE LOWEST LEVEL CONSISTENT WITH MAINTAINING THE SECURITY OF BERLIN AND OF THE ALLIED FORCES LOCATED THERE."

5. POSSIBILITY THAT US CITIZENS IN LN POSITIONS PAID IN DEUTSCHE MARKS FROM OCCUPATION COST FUNDS WILL BE EMPLOYABLE ONLY UNDER US CIVIL SERVICE RULES. THIS COULD RAISE CONFLICTS WITH THE CURRENT EMPLOYMENT REGIME. A US DESIRE TO DETERMINE THE TOTAL TERMS AND CONDITIONS OF EMPLOYMENT OF SUCH PERSONNEL IN A MANNER AT MAJOR VARIANCE WITH THE BTA WOULD BE POORLY RECEIVED BY THE OTHER MEMBERS OF THE AK, SINCE SUCH ACTION WOULD SERIOUSLY DISRUPT LABOR RELATIONS WITH THE EMPLOYEES AND EMPLOYEE REPRESENTATIVE GROUPS.

6. AS A RESULT OF 5 ABOVE, A POSSIBLE MANPOWER SHORTAGE IN LN POSITIONS SINCE ONE LIKELY RESULT WOULD

BE THE DIFFICULTY OF STAFFING LN POSITIONS WITH US CITI-
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PAGE 03 USBERL 00207 05 OF 06 261619Z

ZENS. (THE LARGE MAJORITY OF WHICH ARE EMPLOYED DUE TO
THE ABSENCE OF QUALIFIED GERMAN OR THIRD COUNTRY NATIONALS).

IV. ISSUE

HOW SHOULD THE US PROCEED IN THE EVENT OF A FINAL
DECISION THAT SUCH PERSONNEL ARE US GOVERNMENT EM-
PLOYEES?

ANSWER: IN SUCH AN EVENT, IT IS INCUMBENT UPON THE US
TO ENGAGE IN THOROUGH, PRIOR CONSULTATION ON THE ONE
HAND WITH THE FEDERAL REPUBLIC OF GERMANY AND ON THE
OTHER HAND, WITH THE AK THROUGH THE LABOR WORKING PARTY.

1. CONSULTATIONS WITH THE FEDERAL REPUBLIC OF GERMANY.
THE LETTER FROM THE ALLIED HIGH COMMISSIONERS TO
CHANCELLOR ADENAUER ON RELATIONS TO THE FEDERAL REPUBLIC
OF GERMANY AND BERLIN, CONTAINS THE FOLLOWING UNDERTAKING
OF THE THREE POWERS:

BEGIN TEXT

"IN VIEW OF THE DECLARATION OF THE FEDERAL REPUBLIC
CONCERNING MATERIAL AID TO BERLIN AND THE CHARGE ON THE
FEDERAL BUDGET OF THE OCCUPATION COSTS OF THE THREE
POWERS IN BERLIN IN ACCORDANCE WITH THE PROVISIONS OF
EXISTING LEGISLATION, THE THREE POWERS WILL BE PREPARED
TO CONSULT WITH THE FEDERAL GOVERNMENT PRIOR TO THEIR
ESTABLISHMENT OF THEIR BERLIN OCCUPATION COST BUDGETS.
IT IS THEIR INTENTION TO FIX SUCH COSTS AT THE LOWEST
LEVEL CONSISTENT WITH MAINTAINING THE SECURITY OF BERLIN
AND OF THE ALLIED FORCES LOCATED THERE." END TEXT

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PAGE 01 USBERL 00207 06 OF 06 261514Z
ACTION EUR-12

INFO OCT-01 ISO-00 L-03 PER-01 OPR-02 TRSE-00 ABF-01
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INFO SECDEF WASHDC
AMEMBASSY BONN
CINCUSAREUR HEIDELBERG GER//AEAGA-C//

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DEPARTMENT FOR L/M BURMAN & EUR/CE CHESTER
BONN FOR CROWLEY, BELLINGER & PFUND
SECDEF FOR DOD/GC JAMES ALLEN

THERE IS LITTLE DOUBT THAT THE CONTEMPLATED IRS
DECISION WOULD RESULT IN NOTICEABLE INCREASE IN
THE COST OF THE OCCUPATION TO THE FEDERAL GOVERNMENT.
THE LETTER TO THE CHANCELLOR CONSTITUTES AT LEAST A
POLITICAL UNDERTAKING TO CONSULT WITH THE FEDERAL
GOVERNMENT PRIOR TO THE INSTITUTION OF ACTIONS WHICH
WOULD BRING ABOUT THE INCREASE IN THE BUDGET. ARGUABLY,
THE US (AS WELL AS THE FRENCH AND BRITISH) UNDERTAKING
IN THIS PASSAGE INVOLVES A LEGAL, AS WELL AS POLITICAL,
OBLIGATION. (CONFER: NUCLEAR TEST CASES OF THE INTER-
NATIONAL COURT OF JUSTICE ON THE EFFECT IN INTERNATIONAL
LAW OF UNILATERAL DECLARATIONS). THE UNDERTAKING TO FIX
OUR COST AT THE LOWEST LEVEL CONSISTENT WITH MAINTAINING
THE SECURITY OF BERLIN AND OF THE ALLIED FORCES LOCATED
THERE WOULD NOT APPEAR TO BE CONSISTENT WITH A DECISION
BY THE US THAT US CITIZENS AND RESIDENT ALIENS WORKING
IN PURSUANCE OF "MAINTAINING THE SECURITY OF BERLIN AND
OF THE ALLIED FORCES LOCATED THERE" AND PAID BY THE
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PAGE 02 USBERL 00207 06 OF 06 261514Z

FEDERAL REPUBLIC OF GERMANY OWE TAXES TO THE US WHICH
WOULD HAVE TO BE COLLECTED BY THE FEDERAL REPUBLIC OF
GERMANY THROUGH THE BERLIN SENAT AT SUBSTANTIAL COST TO
THE FEDERAL REPUBLIC. THE SAME CAN BE SAID OF SOCIAL
SECURITY WITHHOLDING; EXCEPT THAT IN THE LATTER CASE,
THERE IS THE ADDITIONAL FACTOR THAT ARGUABLY, THE FEDERAL
REPUBLIC MIGHT BE CALLED UPON BY THE US TO PAY (AS
PART OF THE OCCUPATION COSTS) THE EMPLOYER'S CONTRIBUTION.

IN THE FACE OF ANNUAL EFFORTS BY THE ALLIES, IN
PARTICULAR THE US, TO KEEP THEIR OCCUPATION COSTS TO
THE MINIMUM AND IN THE FACE OF ANNUAL GERMAN REMINDERS
TO PRACTICE ECONOMICS IN BERLIN, IT WOULD BE ESSENTIAL
TO DISCUSS WITH THE FEDERAL REPUBLIC, IN ADVANCE OF ANY
IMPLEMENTATION, A DETERMINATION THAT SUCH US CITIZENS
AND RESIDENT ALIENS ARE USG EMPLOYEES.

2. CONSULTATION WITH THE ALLIED KOMMANDATURA.

CONSULTATIONS WITH THE AK MUST ALSO BE TAKEN IN ADVANCE OF ANY ACTIONS LEADING TO IMPLEMENTATION OF A DECISION THAT SUCH EMPLOYEES ARE USG EMPLOYEES, SINCE AS DESCRIBED EARLIER IN THIS MESSAGE, THE AK IS ULTIMATELY RESPONSIBLE IN BERLIN FOR THE EMPLOYMENT OF SUCH PERSONNEL, AND AK APPROVAL WOULD PROBABLY BE NECESSARY IN ORDER TO GIVE EFFECT IN BERLIN TO THE CONSEQUENCES OF SUCH A DECISION, INCLUDING DEALING WITH LIKELY MAJOR LABOR-MANAGEMENT PROBLEMS. GEORGE

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